No. 14,086

IN THE

United States Court of Appeals

For the Ninth Circuit

STEPHEN KONG, JR.,	*Appellant,*
vs.	
UNITED STATES OF AMERICA,	*Appellee.*

On Appeal from the United States District Court for the Territory of Hawaii.

BRIEF FOR APPELLANT.

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I.

STATEMENT OF JURISDICTION.

By indictment returned by a grand jury in the United States District Court for the District of Hawaii it is charged that appellant "did endeavor to influence, obstruct, and impede the due administration of justice." Upon conviction he was sentenced on the 4th day of September, 1953 to imprisonment for three years, (R. pp. 14 and 15) and in due time gave notice of, and perfected, his appeal. (R. p. 16.)

The trial judge, Honorable J. Frank McLaughlin, believing that this appeal presents a substantial ques-

tion to be ruled on by this Court, admitted appellant to bail pending appeal.

The jurisdiction of this Court to review the judgment of the District Court derives from Title 28 of the United States Code, "Judiciary and Judicial Procedure," Sections 1291 and 1294.

II.

STATEMENT OF THE CASE.

An indictment purporting to charge appellant with a violation of Section 1503 of Title 18 of the United States Code was found by a United States grand jury in the District of Hawaii on February 18, 1953. (R. p. 3.)

In a conference at the bench of the presiding judge who had received the report of the grand jury, the following took place, care being taken that none of it should be heard by any one other than the parties to the conference and the official Court reporter.

> Mr. Barlow. I am inviting attention to an indictment that has been returned against Steven Kong, Jr., and ask at this time that the indictment be placed on the secret file for the following reasons: The individual who had been approached in this matter was a man by the name of Peneku. At the time he was approached he was duly impaneled to serve as a juror in the Fujimoto-Smith Act trial which is now in progress before Judge Jon Wiig, and in order that the government can never be accused of

creating a climate that perhaps may be prejudicial to any of the defendants, the government at this time would like to have the matter put in the secret file until such time as the Smith Act case before Judge Wiig is terminated.

The Court. Very well. Although it does not fit squarely within the technical provisions of rule 6 (e), I will nevertheless grant the request in view of the fact that it is the government that asks for it and assumes the responsibility of the man fleeing the jurisdiction before the indictment is released from the secret file.

Mr. Barlow. Thank you.

The Court. And as soon as that particular case, so-called Smith Act case, is over, that is over in the legal sense, in this Court exclusive of any appeals.

Mr. Barlow. That is right, your Honor.

The Court. This indictment then automatically comes off the secret file.

Mr. Barlow. Thank you, sir.

(R. pp. 4 and 5.)

It was not until after a verdict of guilt against all seven defendants in the Fujimoto-Smith Act trial referred to above that the indictment in this case was taken off the secret file and this appellant for the first time knew of its existence. This occurred nearly five months after the indictment of appellant, that is to say, approximately July 15, 1953.

Before entering a plea of not guilty appellant filed a motion to dismiss the indictment on the grounds, among others, that he was deprived of his right to

a speedy trial and that the indictment does not state facts sufficient to constitute an offense against the United States.

The motion to dismiss the indictment was denied. Upon his plea of not guilty, appellant went to trial before a jury which after being out slightly more than nine hours including time for luncheon and dinner, found him guilty.

After one Samson Nani Peneku had been selected and sworn as a juror to hear the aforementioned Smith Act case, and before any evidence had been adduced in that case, appellant, who was keeping company with Peneku's niece, was at Peneku's home which he had been in the habit of visiting together with the niece, the following occurred:

Q. Now, Mr. Peneku, what were the people in the house doing? Were they sitting there talking?

A. We had a few bottles of beer with the exception of my Mrs. and I.

Q. You had a few beers?

A. Yes.

Q. Who brought the beer to the house?

A. Mrs. Gohier.

Q. Did you see Mr. Kong?

A. Yes.

Q. What were you doing?

A. I was lying down on the punee.

Q. Were you reading?

A. Yes, sir.

Q. What were the rest of them doing?

A. They were sitting around the table and talking.

Q. After the conversation, did Mr. Kong come to you and say anything?

A. I didn't understand you.

Q. Did Mr. Kong, the defendant here, come over to you while you were on the couch reading and say anything to you?

A. Yes.

Q. What did he say?

A. He said, "Hey, you, I want to talk to you."

Q. Did he say anything else?

A. No, that was all.

Q. What did you say?

A. I hesitated for a while and I looked at him and finally I stood up and went with him.

Q. Where did you go?

A. We went to my father-in-law's room.

Q. Was anyone else in the room?

A. No, sir.

Q. Did you have a conversation with Mr. Kong in the room?

A. Yes, sir.

Q. Just tell us as well as you can remember, Mr. Peneku, what was said to you and what you said to him.

A. Yes, sir. Well, he said he wanted me to vote not guilty against the Smith Act because Harriet was a great friend of his.

Q. Who was a great friend of his?

A. Harriet.

Q. Do you know anyone named "Harriet"?

A. At that time I didn't know who Harriet was, but after I recalled Harriet Bouslog, the lawyer. He didn't mention it, but to my opinion that is the only one I could think of, Harriet Bouslog.

Mr. Soares. I move that the opinion be stricken and the jury instructed to disregard it.

The Court. Yes. His opinion as to what the speaker who used the name "Harriet" meant may go out. We are only interested in what he understood himself.

Q. (by Mr. Richardson). What was it that was said about Harriet?

A. That Harriet was a great friend of his, that she was going to take up his case on Maui for his mother.

Q. And you stated he asked you to vote not guilty?

A. Yes, sir.

Q. What did you understand him to mean by that?

Mr. Soares. We object to the witness' understanding, and ask that the jury draw its own conclusions as to the proper understanding to be drawn from those remarks.

Mr. Richardson. This is the witness' understanding that I am asking for.

The Court. The witness may answer.

Q. (by Mr. Richardson). What did you understand him to mean when he asked you——

The Court. No.

Mr. Richardson. I phrased it wrong. What did I ask you?

The Court. In any situation like that I will not let a witness testify as to what he thinks the

speaker meant, but I will let the witness testify as to what he understood was meant by the words used.

Mr. Soares. We object to that situation for the same reason.

The Court. Very well.

Mr. Richardson. May I proceed?

The Court. Make sure the witness understands the question.

Q. (by Mr. Richardson). What was your understanding of Mr. Kong's statement to you?

A. Well, he said that Harriet was a good friend of his; that she was going to handle his mother's case on Maui.

Mr. Soares. I can't hear the last words. The witness dropped his voice.

The Court. Speak up.

The Witness. And that Harriet was going to defend his mother on Maui.

Q. (by Mr. Richardson). What was your understanding of what he said about voting not guilty?

Mr. Soares. We object to that, if the Court please. He can't usurp the functions of the jury. The jury is given the facts and they will determine whether or not this man acted corruptly. He can't set up an opinion for them by stating, "As for me, I understood thus and so."

The Court. The witness may testify, as I have already ruled, as to what he understood the speaker to mean, so far as the witness is concerned.

Q. (by Mr. Richardson). The question is what was your understanding of what Mr. Kong said to you?

A. That is what he said, that Harriet was a good friend of his; that she was going to take up the case of his mother.

Q. You said he asked you to vote not guilty?

A. Yes, sir.

Q. What was your understanding of that with reference to what he said, with reference to voting not guilty?

A. He told me to vote not guilty. I said, "No, no, I can't do that."

Q. What did you understand the words, "not guilty" meant? Vote not guilty in what way?

Mr. Soares. We urge the same objection, if the Court please. Let him tell the whole conversation.

The Court. It is the same objection, but I think what you mean is that the question is leading. That objection would be good.

Mr. Richardson. This is a difficult witness. If I could have a little latitude—I am not trying to testify for him.

The Court. I agree that he is slightly difficult, but it would be much better, under the circumstances, if you would exhaust the possibility of telling what happened completely and clearly.

Q. (by Mr. Richardson). Was that everything that was said back there in the room between you and Mr. Kong? Was anything else said?

A. I don't remember anything else that was said, but there was one understanding in my mind in regard to vote "not guilty" and I took it for the Smith Act case.

Q. That was your understanding?

A. Yes, that was my understanding.

Q. How did you feel about what he said to you?

A. I didn't tell——

Mr. Soares. Objected to as being incompetent, irrelevant and immaterial, the witness' reaction, a personal feeling in the matter.

The Court. The objection is sustained.

Q. (by Mr. Richardson). Did you have any reaction to what he said, Mr. Peneku?

A. Well——

Mr. Soares. If you can't testify to what his reaction was, whether he had one or not becomes immaterial. We object to the question on that ground, in view of the Court's last ruling.

The Court. No, this is a different question. A reaction to what he said might be additional words. I don't know. However, don't by this question be seeking to circumvent my prior ruling.

Mr. Richardson. No, I am asking his reaction to it.

Q. (by Mr. Richardson). What was your reaction to what he said?

A. I got mad right off the bat and I opened the door and I said, "Get out."

Q. Did he leave?

A. I told him to get out. He went ahead and I closed the door. He walked out to the kitchen. They sat there a little while and scrammed.

Q. What was the last?

A. They sat down a little while and then scrammed, left the house.

Q. Whom do you mean by "they"?
A. Mrs. Gohier and Kong.
(R. pp. 67-72.)

This incident which occurred on November 8, 1952 was promptly reported to the judge presiding at the Smith Act trial who cited appellant for contempt. After a hearing in the judge's chambers no action was taken other than to excuse the juror Peneku whereupon the trial of the Smith Act case proceeded with one of the extra jurors who had been selected and sworn at the same time as was Peneku sitting in his place.

The trial of appellant having finally been commenced, at the conclusion of the evidence and in the presence of the jury appellant moved for a judgment of acquittal on each of the grounds heretofore laid in the motion to dismiss the indictment and with reference to the indictment itself that it is insufficient in that it merely charges the defendant did endeavor to influence the due administration of justice, whereas it does not allege that he did so corruptly; that it does not indicate the matter in which the due administration of justice was attempted to be interfered with and it is not clear from the indictment whether the charge is an endeavor to influence the juror or the due administration of justice or both. Further, that there is no evidence, at least no evidence amounting to more than a mere scintilla of an

endeavor that the defendant acted corruptly and no evidence of motive.

The motion for judgment of acquittal was denied.

III.

SPECIFICATION OF ERRORS RELIED UPON.

1. The Court erred in denying appellant's motion to dismiss the indictment and in denying appellant's motion for a judgment of acquittal on the ground that appellant was deprived of his right to a speedy trial.

2. The Court erred in denying appellant's motion to dismiss the indictment and in denying appellant's motion for a judgment of acquittal on the ground of the insufficiency of the indictment.

3. The Court erred in instructing the jury that the indictment, otherwise faulty, was made sufficient by reading into it language which was not there.

4. The Court erred in refusing to instruct the jury more specifically in accordance with instructions Nos. 3 and 4 requested by appellant as to the meaning of the word "endeavor" as used in the statute.

5. The Court erred in ruling that motive is not an element of the offense and, for that reason alone, refusing to instruct the jury in accordance with defendant's requested instruction No. 2.

IV.

ARGUMENT.

SPECIFICATION OF ERROR NO. 1.

THE COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS THE INDICTMENT AND IN DENYING APPELLANT'S MOTION FOR A JUDGMENT OF ACQUITTAL ON THE GROUND THAT APPELLANT WAS DEPRIVED OF HIS RIGHT TO A SPEEDY TRIAL.

The indictment against appellant was placed on the secret file, not for any of the recognized reasons and as provided in Rule 6 (e), but at the request of the United States Attorney to avoid criticism which could have no basis in fact. (R. pp. 4 and 5.)

The right to a speedy trial is granted by the Constitution of the United States. While it is a right which a defendant may waive, it is not one that the government can take away.

This is a case of first instance. None of the reported cases that we have been able to find on this subject deals with a situation in which, as in this case, an indictment was placed on the secret file to keep the accused from being forewarned or to avoid being apprehended. The basis for placing this indictment on the sceret file was, in effect, personal to the prosecuting officer: he wanted to avoid possible criticism by communists then on trial and subsequently convicted of a violation of the Smith Act. In other words, in order to assure those Communists of a more favorable "climate" (to use the District Attorney's own term) he was willing that appellant

be deprived of a constitutional right personal to him and in nowise in conflict with any right of the government. It is noteworthy that in requesting the placing of the indictment against the defendant on the secret file it was not contended by anyone that the government would be hampered in its prosecution of the Smith Act case referred to or that to let it be known to the defendant that he had been indicted, thus giving him an early start in preparing for his defense, would have probably or even possibly resulted in a miscarriage of justice to the Communists then on trial.

Nor is it incumbent upon a defendant whose right to a speedy trial has been interrupted to show (as the trial judge in the case below intimated), that he lost an advantage such as losing the evidence of witnesses. For, as has been said fairly recently by a prominent jurist, even though it is extremely unlikely that one accused of crime suffered the slightest handicap from the withholding or denial of a right, "we cannot dispense with constitutional privileges because in a specific instance they may not in fact serve to protect any valid interest of their possessor."

SPECIFICATION OF ERROR NO. 2.

THE COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS THE INDICTMENT AND IN DENYING APPELLANT'S MOTION FOR A JUDGMENT OF ACQUITTAL ON THE GROUND OF THE INSUFFICIENCY OF THE INDICTMENT.

SPECIFICATION OF ERROR NO. 3.

THE COURT ERRED IN INSTRUCTING THE JURY THAT THE INDICTMENT, OTHERWISE FAULTY, WAS MADE SUFFICIENT BY READING INTO IT LANGUAGE WHICH WAS NOT THERE.

The indictment against Stephen Kong, Jr., appellant herein, was returned on February 18, 1953, appellant being charged with endeavoring to influence, obstruct and impede the due administration of justice in violation of Section 1503, Title 18, United States Code. The indictment reads as follows:

> That on or about November 8, 1952, in the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Court, Stephen Kong, Jr., did endeavor to influence, obstruct and impede the due administration of justice in that he did knowingly, wilfully, unlawfully, feloniously and corruptly endeavor to influence, intimidate and impede Samson Nani Peneku, the said Samson Nani Peneku being then and there a trial juror duly impaneled and sworn in the case of United States vs. Charles Fujimoto, et al., Cr. No. 10,495, pending in the United States District Court for the Territory of Hawaii, in violation of Section 1503, Title 18, United States Code.

The indictment thus charges appellant with an endeavor to impede the due administration of justice. The appellant is accused of attempting to influence Samson Nani Peneku, a trial juror. However, the charge contained in the indictment fails to make the averment that the appellant corruptly endeavored to influence the due administration of justice. Any reference to the attempt being a corrupt or unlawful one is omitted from the part of the indictment charging the appellant with an offense. This amounts to an omission of an essential element from the charge which makes the indictment fatally defective.

The statute covering the offense, Section 1503, requires that the due administration of justice be influenced, obstructed or impeded, either corruptly, or by threats or force, or by threatening letter or communication. The indictment fails to charge that the endeavor was made in any of the ways mentioned above. It merely charges that an endeavor was made by the appellant to influence, obstruct or impede the due administration of justice.

This omission was called to the attention of the trial judge, and the trial judge who was then aware of this defect in the indictment instructed the jury that the word "corruptly" was to be read into the charge. The Court instructed the jury in the following language on this point:

> Without changing anything that I have said to you with respect to this word "corruptly," it has been brought to my attention that in the

> third line of this indictment it says that the defendant did endeavor to influence, obstruct and impede the due administration of justice. Then it goes on in that he did thus and so. Now, with respect to the charging part, that he did endeavor to influence and obstruct and impede the due administration of justice, by way of interpreting the charge you have to drop down to the bottom where it says in violation of Section 1503 and that charge implies that he did it corruptly as the statute alleges, as the nature of the offense, which in turn means he did it with a criminal intent. So that you are to understand the charges to be that the defendant did corruptly, that is, did with a criminal intent knowingly, wilfully, unlawfully and feloniously endeavor to influence, obstruct and impede the due administration of justice by doing thus and so. And of course, "so" refers to the words used that follow the phrase, "in that he did," so and so. Very well. Does that clear up the point? (R. 180.)

The insertion of a word which was not in the indictment amounted to an amendment of the charge. Appellant submits that the amendment was one of substance and not merely one of form.

The indictment is also faulty in that it fails to indicate clearly the manner in which the due administration of justice was attempted to be interfered with. The indictment charges that the due administration of justice was obstructed in that there was an endeavor to influence, intimidate and impede

Samson Nani Peneku. It further describes Samson Nani Peneku as a trial juror in a case pending before the United States District Court for the Territory of Hawaii. However, there is no reference to the fact that an attempt was made to influence, intimidate and impede Samson Nani Peneku in the discharge of his duty as a juror. The statute does not condemn every attempt to influence a juror. A scrutiny of Section 1503 makes it obvious that it is not every attempt to influence a juror that is proscribed by its terms. What is made criminal by the section is an attempt to influence a person in the discharge of his duty as a juror. The indictment is made fatally defective by the omission of this essential element of the crime charged.

The Sixth Amendment to the Constitution of the United States guarantees the accused in a criminal case the right to be informed of the nature and cause of the accusation. *Asgill v. United States,* 60 F.2d 780 (C.A.4). The function of the indictment is to provide this requisite notice to the defendant. Appellant submits that the indictment herein failed to provide the required information. A person indicted for violating a criminal statute is presumed innocent and the sufficiency of an indictment must be tested upon the presumption that the defendant is innocent and does not have any knowledge of the facts charged. 31 Corpus Juris 653. When the indictment herein is read in the light of the presumption of innocence it is obvious that an indictment

which omits several of the essential elements of the crime charged is fatally defective.

The statute herein involved makes a corrupt intent an essential element of any charge brought under it. The omission of this material element makes the indictment defective in substance. An indictment is sufficient to withstand attack only if it alleges every material element of the offense directly and with certainty. *Pettibone v. United States,* 148 US 197, 37 L.ed. 419; *United States v. Hess,* 124 US 483; *Harris v. United States,* 104 F.2d 41 (C.A. 8); *White v. United States,* 67 F.2d 71 (C.A. 10). The trial judge was of the opinion that the necessary element of corrupt intent was supplied by inference. In reply to a request from the jury that the meaning of criminal intent be clarified, he said:

> * * * Now, here it could be said with justification that this particular charge is not too artistically drawn, and these words, as you find them in the particular charge, are to a degree misplaced. However, I have told you that the charge is that on or about the date alleged the defendant did endeavor to influence, obstruct and impede the due administration of justice in violation of section 1503. Now it is that concluding clause that saves the day by requiring an inference from that concluding clause that the alleged act was done with a criminal intent. So that after the word "did" in the third line you are to understand that at that point the law inserts that it is charged that the act alleged was done with a criminal intent. And thus you

should read that as though it were written, "did knowingly, wilfully, unlawfully and feloniously endeavor to influence, obstruct and impede the due administration of justice." (R. 183-184.)

Regardless of whether the trial judge's opinion was that the necessary element of an unlawful intent was supplied by inference, the decided cases on this point are clear that any of the material elements of a crime cannot be supplied by inference, intendment, or implication. *Pettibone v. United States, supra; United States v. Carnay,* DC, 228 F. 163. Although legislation may proceed by implication, good pleading may not.

Where an essential word or clause is omitted from the indictment, the omission is fatal to the indictment, even though the Court may know what was intended. *Kutler v. United States,* 79 F.2d 440 (C.A. 3.)

The trial judge, however, was of the opinion that an essential element in the indictment was supplied by inference. He went further and instructed the jury that they were to insert a word into the indictment which was not there. This would almost amount to an amendment of the indictment not permitted by the proposition of law that only a grand jury can return an indictment. *Ex parte Bain,* 121 U.S. 1, 30 L.ed. 849. Appellant submits that the omission of the allegation of corrupt intent from the charging part of the indictment makes the indictment fatally defective.

As mentioned previously another averment necessary to support the charge herein is that the endeavor to influence a juror must be made in relation to the discharge of his jury duty. The indictment herein failed to make such an allegation. The indictment contains the description of the juror in a pending case but neglects to aver that the defendant endeavored to influence the juror in the discharge of his duty as such. Section 1503 does not make it a crime to influence a juror on any matter. It condemns the influencing of a juror in the exercise of his duty as a juror. Here again we have a situation when the trial Court found it necessary to read something into the indictment by inference. The fact that the statute involved read in the light of the common law, and of other statutes on like matters, enables the Court to infer the intent of the Legislature does not dispense with the necessity of alleging in the indictment all of the facts necessary to bring the case within that intent. *United States v. Cruikshank,* 92 U.S. 542; *United States v. Carll,* 105 U.S. 611, 26 L.ed. 1135. See also *Harris v. United States, supra.* Appellant submits that this omission also made the indictment fatally defective.

SPECIFICATION OF ERROR NO. 4.

THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY MORE SPECIFICALLY AND IN ACCORDANCE WITH INSTRUCTIONS NOS. 3 AND 4 REQUESTED BY APPELLANT AS TO THE MEANING OF THE WORD "ENDEAVOR" AS USED IN THE STATUTE.

On the authority of *United States v. Russell,* 255 U.S. 138, 143, appellant requested the trial judge to instruct the jury as follows:

Defendant's Requested Instruction No. 3

> The word "endeavor" as used in the statute and in the indictment means more than a simple request unaccompanied by any effort or inducement to have the request granted. (R. p. 4.)

Defendant's Requested Instruction No. 4

> The word "endeavor" is distinguished from synonymous words such as "attempt" or "effort" by the fact that the synonymous words relate to a single act whereas the word "endeavor" means a continued series of acts. (R. p. 4.)

In instructing the jury, all that the trial judge said in the nature of definition of the word "endeavor" and its significance in the statute was:

> Now, the word "endeavor" is used. That word means exactly what you think it means, namely, to attempt, to try. It does not mean that the attempt has to be successful. It might be, but it doesn't have to be. The thing that is declared to be wrong is the attempting, the trying to influence the administration of justice improperly, whether that succeeds or not. (R. p. 172.)

The evidence showed that what appellant did was to make a request of the juror that as a favor to him he vote "not guilty"; and this in the interim between the swearing in of the jury and the introduction of a single witness upon noting the juror's reaction to the request, appellant pressed it no further.

With the Court's over-simplification of the meaning of the term "endeavor," and without a more complete definition of it as understood in law, such as contained in the requested instructions, the jury was prevented from distinguishing from a thoughtless request and an *endeavor* to corrupt.

SPECIFICATION OF ERROR NO. 5.

THE COURT ERRED IN RULING THAT MOTIVE IS NOT AN ELEMENT OF THE OFFENSE, AND FOR THAT REASON ALONE, REFUSING TO INSTRUCT THE JURY IN ACCORDANCE WITH DEFENDANT'S REQUESTED INSTRUCTION NO. 2.

The appellant, in writing, requested the Court to instruct the jury as follows:

> Defendant's Requested Instruction No. 2
>
> If you cannot unanimously say that you believe from the evidence that defendant's purpose in speaking to the juror Peneku was corrupt and that in doing so he was endeavoring to influence, obstruct, or impede the due administration of justice, your verdict must be not guilty. (R. p. 13.)

As appears from a notation on the requested instruction, it was denied because of the judge's ruling that in this case motive is not an element.

Now, the trial judge lingered long on the use of the word "corruptly" in the statute and in the indictment; so much so that he apparently had misgivings as to whether he had confused the jury on the subject. (R. p. 186.)

Had he but recognized that there can be no criminal intent (and, therefore, no crime such as here involved) without a motive and given appellant's requested instruction No. 2, the whole matter would have been made clear.

V.

CONCLUSION.

It is respectfully submitted that appellant was wrongfully convicted.

Dated, Honolulu, Hawaii,
March 29, 1954.

Respectfully submitted,
O. P. SOARES,
Attorney for Appellant.